90-989

No.——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CALDOR, INC.,
Petitioner,

v.

COMMISSIONER OF THE DEPARTMENT OF CONSUMER PROTECTION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Connecticut

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Supreme Court of Connecticut upheld the constitutionality of a State regulation suppressing advertising that the State claims is "deceptive" as a matter of law, without requiring the State to demonstrate how the advertising is misleading or otherwise justify the restrictions the State seeks to impose on this form of commercial speech. The questions presented are:

(1) Whether under *Peel v. Attorney Registration and Disciplinary Comm. of Ill.*, —— U.S. ——, 110 S.Ct. 2281 (1990) a State court can refuse to conduct a *de novo* review of the challenged advertising; and

(2) Whether under *Central Hudson Gas v. Public Service Comm. of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980) a State can choose suppression over disclosure of commercial information when disclosure would serve as a more limited restriction on commercial speech?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner Caldor, Inc. and the respondents Mary M. Heslin, Commissioner of the Department of Consumer Protection, and the State of Connecticut Department of Consumer Protection.

Petitioner Caldor, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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OPINIONS BELOW

The opinion of the Supreme Court of Connecticut (Appendix at pp. 1a-14a, *infra*) is reported at 215 Conn. 590, —— A.2d —— (1990). The opinion of the superior court for the Judicial District of Hartford-New Britain at Hartford (Appendix at pp. 15a-20a, *infra*) is unreported.

JURISDICTION

The decision of the Supreme Court of Connecticut was entered on July 10, 1990. The Supreme Court of Connecticut denied petitioner's Motion for Reargument and Reconsideration on September 18, 1990. The jurisdiction of this court rests on 28 U.S.C. § 1257(3).

REGULATION INVOLVED

Section 42-110b-19(e) of the Regulations of Connecticut State Agencies, appears, in its entirety, in the text of the Supreme Court of Connecticut's decision at 215 Conn. 590, at 592. (Appendix at p. 3a).

STATEMENT OF THE CASE

Caldor, Inc. ("Caldor") is a New York corporation engaged in the business of retail sales at thirty-one locations in the state of Connecticut and eighty-eight locations in seven other states. For the past fifteen years, Caldor advertised manufacturer rebates by illustrating the net price of a product after deducting the rebate a consumer can receive from the manufacturer.

During this time, no customer ever filed a single complaint alleging that he had been misled by the retail advertising of such a rebate because the rebate amount was not paid to the consumer at the point of purchase. However, the record shows that consumers did complain about certain conditions imposed by some manufacturers to obtain refunds.

Responding to consumer complaints dealing with the mechanics of obtaining refunds from manufacturers, the Commissioner of the Department of Consumer Protection, Mary M. Heslin ("Heslin"), issued a regulation imposing conditions on the advertising of rebates by retailers such as Caldor, not on manufacturers. While the alleged purpose of the Commissioner's action related to these consumer complaints, the regulation did not deal directly with the aspects of manufacturers' rebates that generated the consumer complaints.

Rather, the regulation was directed toward the advertising of rebates by retailers. The regulation provided that:

> It shall be an unfair or deceptive act or practice to . . . (e) advertise the availability of a manufacturer's rebate by displaying the net price of the advertised item in the advertisement, unless the

> amount of the manufacturer's rebate is provided to the consumer by the *retailer* at the time of purchase of the advertised item.

9 Reg. Conn. Agencies, DCP § 42-110b-19(e) (emphasis added). The stated purpose of the regulation was "[to] require retailers which advertise the net price of an item after deduction of a manufacturer's rebate to pay consumers the amount of such rebate at the time of purchase." *Id.* While the stated purpose merely reiterates the regulation, it purportedly alleviates the logistical problems consumers face in obtaining rebates from manufacturers by converting a rebate into a coupon at the time of purchase.

Through its amended complaint dated January 30, 1990, Caldor sought injunctive relief staying the effectiveness of the regulation on the grounds that the regulation, as written, was invalid in one or more of the following ways:

a) the regulation is inconsistent with protections that are afforded commercial speech pursuant to the First Amendment of the United States Constitution and §§ 4 and 5 of the Connecticut Constitution;

b) the regulation is inconsistent with, and in excess of, the statutory authority granted to the defendants to promulgate such a regulation; and

c) the regulation is in violation of substantive due process in that it is arbitrary and capricious.

After a trial to the court, judgment was entered in favor of the defendants. In its memorandum of decision the trial court stated that (1) in promulgating the regulation the defendant acted within the authority granted her by C.G.S. § 42-110b(c); and (2) the failure to disclose that postage stamp costs are required in order to obtain a rebate from the manufacturer rendered the advertising "deceptive" as a matter of law. (Appendix at p. 20a). Therefore, because of the alleged deceptive na-

ture of net price advertising, the court found that it is not entitled to protection under the First Amendment of the United States Constitution and §§ 4 and 5 of the Connecticut Constitution. *Id.*

Although Caldor appealed to the intermediate court, the Supreme Court transferred the appeal to itself because of the important public policy involved. Connecticut Practice Book § 4023. In limiting its review of the challenged regulation to "whether, in light of the evidence, the [named defendant] has acted unreasonably, arbitrarily, illegally, or in abuse of her discretion" (Appendix at pp. 6a-7a), the Connecticut Supreme Court, with one justice dissenting, deferred to the agency and adopted the Commissioner's finding of deception without requiring any showing of deception beyond the agency's conclusion. The court refused to substitute its own judgment for that of the named defendant and noted that the "nature of the plaintiff's advertising" is not the proper focus of judicial inquiry when the court is assessing the validity of a regulation promulgated by the Commissioner of the Department of Consumer Protection. (Appendix at 6a).

The dissent noted that the party seeking to uphold a restriction on commercial speech carries the burden of justifying it and found that the majority failed to require the defendant to make such a showing. (Appendix at p. 13a). This is particularly important due to the concession of the defendant that no one complained about Caldor's advertising, and that even if more information, such as postage cost, was provided, the regulation would still apply. *Id.* (Appendix at pp. 23a-24a).

Because of the release of this Court's opinion in *Peel v. Attorney Registration and Disciplinary Comm. of Illinois*, —— U.S. ——, 110 S.Ct. 2281, 58 U.S.L.W. 4684 (1990), Caldor sought timely reconsideration and reargument which the Connecticut Supreme Court denied on September 18, 1990.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE STATE CANNOT TAKE COMMERCIAL SPEECH OUT OF THE PROTECTION OF THE CONSTITUTION SIMPLY BY LABELING AN ADVERTISEMENT AS MISLEADING WITHOUT SOME SHOWING OF PROOF.

This case illustrates the need for this Court to articulate the analysis to be used when, as here, commercial advertising is labeled as misleading by the State without some showing of proof to support its position. Nearly every consumer purchase requires the expenditure of incidental costs to obtain a product for an advertised price. Until now, no other state or federal agency, or any court, has attempted to define this element of the commercial process as "deceptive" as a matter of law. The Connecticut Supreme Court's decision raises non-disclosure of the cost of postage stamp to a preposterous level of materiality. The consequence of rendering petitioner's net price advertising "factually untrue" for the failure to disclose a potential cost for postage, is to gut the constitutional protections afforded commercial free speech. The Connecticut Supreme Court accomplished this evisceration of First Amendment protection by absolute deference to a state agency in an end-run around the tests developed by this Court to protect commercial speech. Relying on this decision, only political exigency will limit the agency from labelling any particular advertisement as deceptive *per se* for failure to disclose incidental costs (e.g. advertisement of abortion without disclosing that medical coverage may or may not be available), in order to discourage consumer participation in a particular practice. Further, no amount of disclosure of incidental costs will cure the alleged deception.

The Connecticut Supreme Court confused its role by reviewing the agency's rulemaking process as if petitioner sought review as an administrative appeal, as contrasted to its role as arbiter on the issue of whether an advertisement is misleading as a matter of constitutional law.

Peel, supra, —— U.S. at ——, 110 S.Ct. at 2291-92, 58 U.S.L.W. at 4689; *Id.* (O'Conner, J., dissenting), —— U.S. at ——, 110 S.Ct. at 2298, 58 U.S.L.W. at 4693. The court did not perform any independent analysis as to whether the advertising was misleading. Indeed, it admonished the trial court for focusing on the nature of the plaintiff's advertising instead of applying a stricter standard of judicial review over administrative rulemaking, i.e., "whether, in light of the evidence, the [named defendant] has acted unreasonably, arbitrarily, illegally, or in abuse of [her] discretion." (Appendix at pp. 6a-7a).[1] The state courts summarily dismissed constitutional protection for the petitioner's advertising relying solely on the Commissioner's unsubstantiated claim "that net price advertising of a product for which a manufacturer's rebate is offered is inherently misleading." (Appendix at pp. 10-11a). The state court's absolute deference to the administrative process ignores this Court's well established rule that the judiciary is the final arbiter of constitutional law. *Peel, supra,* —— U.S. at ——, 110 S.Ct. at 2291-92, 58 U.S.L.W. at 4689.

Manufacturer rebates are firmly established nationally as an effective means of price competition. A key element to the effectiveness of such programs is the advertisement of net price by the retailer. (Appendix at p. 4a). The Commissioner put no evidence in the record, nor does she claim, that any consumer has in fact been deceived by the non-disclosure of postage expense in obtaining rebates directly from manufacturers. (Appendix at p. 13a). Rather, the court relied on the administrative determination that manufacturer rebate programs needed regulation without regard to the impact on the retailer's

[1] Even under this standard, found in Conn. Gen. Stat. § 4-183(j), the court cannot affirm the administrative agency if the court "finds that the substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusion, or decisions are: (1) in violation of constitutional or statutory provisions. . ."

right to advertise, knowing that the retailer's advertising was not the focus of consumer complaints. As noted in Justice Covello's dissent, "[c]omplaints from consumers about rebate offers related exclusively to the process involved in obtaining the rebate, *not the advertising of the rebate itself*," and the "evidence on the record is wholly insufficient to support the conclusion that there is a likelihood or fair probability that a reasonable consumer would be misled or deceived by the net price advertising format at issue here." (Appendix at p. 13a) (Covello, J., dissenting) (emphasis in original).

When the State attempts to regulate advertising that it deems to be deceptive, the State must either "demonstrate that the advertising 'is inherently likely to deceive' or must muster record evidence showing that 'a particular form or method of advertising has in fact been deceptive.'" *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 659, 105 S.Ct. 2265, 2286 (1985), *citing*, *In re R.M.J.*, 455 U.S. 191, 202, 102 S.Ct. 929, 937 (1982). The Connecticut Supreme Court did not require the Commissioner to demonstrate how net price advertising was inherently misleading, nor did the court require the State to demonstrate how the suppression of net price advertising directly addressed the consumer complaints on which the Commissioner relied to support the promulgation of this regulation. By accepting the Commissioner's conclusions, without performing an independent analysis of its own, the lower court broadened the scope of permissible regulation that administrative agencies can now impose upon commercial speech beyond the bounds previously established by this Court. *See, Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York*, 447 U.S. 557, 566, 100 S.Ct. 2343, 2351 (1980).

The Connecticut Supreme Court adopted these positions even though no other state or the Federal Trade Commission had promulgated rules or regulations dealing with manufacturer rebates in this manner. "Federal author-

ities have *not* established that the net price advertising here at issue is 'unfair or deceptive.'" (Appendix at p. 13a) (Covello, J., dissenting) (emphasis in the original). Where there is no past experience, evidence, or precedent, nor any other state with a similar regulation, there is no justification for the court to be absolutely deferential to the "expertise" of the agency. *Compare, Peel, supra,* —— U.S. at ——, 110 S.Ct. at 2298, 58 U.S.L.W. at 4693. (O'Conner, J., dissenting). *See also, Zauderer, supra,* 471 U.S. at 659, n.3, 100 S.Ct. 2286 (Brennan and Marshall, JJ., concurring in part and dissenting in part) (agency determinations merit deference only to the extent they are supported by evidence and reasoned explanation).

Against this background, and against a presumption of favoring disclosure of information over concealment, *Peel, supra,* —— U.S. at ——, 110 S.Ct. at 2292, 58 U.S.L.W. at 4689, the Connecticut Supreme Court affirmed the Commissioner's and the trial court's findings.

II. NO MATTER HOW TRUTHFUL AND COMPLETE DISCLOSURE IS, CONNECTICUT RETAILERS ARE SUBJECT TO THIS REGULATION IF THEY PUBLISH A PRODUCT'S NET PRICE.

"[D]isclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Peel, supra,* —— U.S. at ——, 110 S.Ct. at 2292, 58 U.S.L.W. at 4689, *quoting, Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S.Ct. 1817, 1829 (1976). Under this regulation even if every conceivable disclosure associated with rebates, including potential postage costs, is published in an advertisement, the retailer is subject to the State's regulation. In other words, in contravention of this Court's well established presumption in favor of disclosure over restraint, *see e.g., Zauderer, supra,* 471 U.S. at 651, 105 S.Ct. at 2282, no matter how truthful and complete disclosure is, retailers

are subject to this regulation as long as they publish a product's net price. The Connecticut Supreme Court did not discuss this anomaly created by the regulation, nor did it examine if there were less restrictive means of achieving the State's governmental objective.

Competition suffers when government restraints deny consumers truthful, nondeceptive information about the commercial alternatives available to them in much the same way as it does when competitors collude to achieve the same result in violation of the anti-trust laws. *See, Virginia Pharmacy, supra,* 425 U.S. at 770, 96 S.Ct. at 1829. The fact that no amount of disclosure will satisfy the State can mean only one of two things—1) that the advertising is not the real issue that the regulation is aimed at, and/or 2) that the State is extending its paternalistic protection of consumers to such a degree that it becomes anti-consumer in its end result. Neither reason is permitted under the First Amendment and this Court should undertake review to dispel any notions that either will be tolerated.

III. THE STATE'S INTEREST IS IN CONTROLLING ALLEGEDLY BURDENSOME CONDITIONS IMPOSED BY SOME MANUFACTURERS, NOT A CONCERN FOR THE DISSEMINATION OF TRUTHFUL COMMERCIAL INFORMATION.

Net price is important truthful commercial information to which consumers are entitled. The "First Amendment's concern for commercial speech is based on the informational function of advertising." *Central Hudson, supra,* 447 U.S. at 563, 100 S.Ct. at 2350, *citing, First National Bank of Boston v. Bellotti,* 435 U.S. 765, 783, 98 S.Ct. 1407, 1419 (1978). In this instance, the Commissioner's professed concern for the dissemination of truthful commercial information was merely a convenient label which she used to validate an otherwise invalid regulation. Representatives of the Commissioner's office testified as to the number and nature of the complaints which exclusively

dealt with the process of obtaining rebates (e.g. unavailability of products, household limits, UPC product code). (Appendix at p. 13a). No consumer complained about net price advertising itself, or complained that they expected to receive the cash value of the offered rebate at the point of sale. *Id.* The State's real interest was in discouraging participation by consumers in rebate programs because such participation led to complaints wholly unrelated to net price advertising. Rather than fashion a regulation that directly addressed the problems with rebate programs that are objectively verifiable and, indeed, the source of the Commissioner's action, the Commissioner chose the expeditious yet unconstitutional method of suppressing truthful price information from consumers.[2] This court has never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised without requiring the State to demonstrate that its remedy is rationally related to a legitimate government interest. *Central Hudson, supra,* 447 U.S. at 569, 100 S.Ct. at 2353; *cf., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 106 S.Ct. 2968 (1986) (regulation banning advertisement of legalized gambling upheld). Regulations "designed to deprive consumers of information about products or services that are legally offered for sale consistently have been invalidated." *Central Hudson, supra,* 447 U.S. at 574, 100 S.Ct. at 2355 (Blackmun, J., concurring).

By preventing retailers from providing consumers with important price information, the Commissioner chooses

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[2] The court claimed that the Commission did not "eliminate the practice of net price advertising entirely," (Appendix at p. 10a), but the record shows that the logistical problems that would result from complying with the regulation's conditions—i.e. providing the cash value of the rebate to the consumer at the point of purchase in order to display the net price, effectively eliminates net price advertising in Connecticut in the practical sense.

suppression over disclosure without addressing whether there is a less restrictive means to accomplish the state's objective. This rationale is blatantly inconsistent with the decisions of this Court. *Zauderer, supra; Virginia Pharmacy, supra.* The lower court, through its deference, allows the administrative agency to invade the First Amendment rights of retailers in an effort to redress problems associated with manufacturers. The consumers right to access to truthful information that assists in intelligent and well-informed purchasing decisions is completely ignored in this approach.

Just as in *Virginia Pharmacy*, the "State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Virginia Pharmacy, supra*, 425 U.S. at 769, 96 S.Ct. at 1829. The suppression of net price advertising does not affect the process of obtaining rebates other than to reduce participation in rebate programs. Those consumers who are able to find rebates are still faced with the task of complying with the manufacturer's conditions. The State can make no claim that the suppression of net price advertising will directly alleviate these perceived burdens and since the regulation is not directed at the manufacturers, manufacturers are free to increase the conditions for qualifying for their rebates. The only effect the suppression of net price advertising has is an anti-consumer reduction in price competition and a deceleration in the introduction of new products to the Connecticut marketplace.

Thus, the regulation bears no reasonable relation to the governmental interest the regulation was designed to address. *Central Hudson, supra*, 447 U.S. at 564, 100 S.Ct. at 2350 ("the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose" or "if the governmental interest could be served as well by a more limited restriction on commercial speech"). This regulation should be directed at

the manufacturers doing business in Connecticut who impose allegedly unfair or burdensome conditions upon consumers attempting to satisfy those conditions, and not on retailers, such as Caldor, who are merely advertising the availability of the manufacturer's offer in Connecticut and eight other states.

The requirement that a regulation addressed to commercial free speech be rationally related to the government interests it is intended to serve cannot protect First Amendment rights if courts are free to override this prong of the test in deference to an agency's expedient choice of remedy.

IV. THE FAILURE OF THE CONNECTICUT SUPREME COURT TO PROPERLY REVIEW THE EVIDENCE WILL CREATE RADICAL DISPARITIES IN FIRST AMENDMENT PROTECTIONS FROM STATE TO STATE.

National unity in the protections afforded commercial speech in the context of advertising is important because of the enormous potential for advertising to cross state lines. Caldor, a retailer doing business across eight states, must adhere to one standard of deception in Connecticut and another standard of deception in the rest of the country as a result of the overly technical and paternalistic interpretation of net price advertising adopted by the Connecticut Supreme Court. And, for advertising media forms that cross state lines, e.g. television advertising on a station that broadcasts both in New York and Connecticut, the Connecticut Supreme Court's decision imposes the Connecticut Commissioner's standard of deception and highly paternalistic views on consumers in other states.

Applying what this Court recently noted in *Peel*, *supra*, —— U.S. at ——, 110 S.Ct. at 2291, 58 U.S.L.W. at 4689, n.16, the level of deference given to Commissioner Heslin in this case will "create radical disparities in First

Amendment protections from State to State." In *Peel*, the Court's concern was that each State could decide for itself whether the advertisement of attorney certification was or was not under the umbrella of the First Amendment. Here, the danger is much more acute because the State's regulation not only sets a First Amendment standard in Connecticut apart from the rest of the nation, but its regulation is likely to deprive citizens in neighboring states of information relating to rebates that those States have chosen not to regulate or to regulate less expansively. Only this Court can remedy this result by granting certiorari.

CONCLUSION

For the foregoing reasons, the petition of a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

SUPREME COURT OF CONNECTICUT

(13754)

CALDOR, INC.

v.

MARY M. HESLIN, COMMISSIONER OF CONSUMER PROTECTION, *et al.*

PETERS, C. J., CALLAHAN, GLASS, COVELLO and HULL, JS.

Argued April 12—decision released July 10, 1990

Action to enjoin the enforcement by the named defendant of a certain state regulation concerning the advertisement of prices of merchandise when manufacturers' rebates are involved, and for other relief, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford, and tried to the court, *Fracasse, J.*; judgment for the defendants, from which the plaintiff appealed. *Affirmed.*

Eliot B. Gersten, with whom was *Peter H. Lovell*, for the appellant (plaintiff).

Stephen R. Park, assistant attorney general, with whom were *John M. Looney*, assistant attorney general, and, on the brief, *Clarine Nardi Riddle*, attorney general, and *Robert M. Langer*, assistant attorney general, for the appellees (defendants).

HULL, J. This appeal involves a challenge to a regulation promulgated by the named defendant, the commissioner of the department of consumer protection,[1] that established as unfair or deceptive certain acts or practices in the advertising of manufacturers' rebates. The plaintiff, Caldor, Inc., instituted the present action seeking a permanent injunction staying the effectiveness and enforcement of the regulation. The case was tried to the court and judgment was rendered for the defendants. From this judgment the plaintiff appealed to the Appellate Court. We subsequently transferred the case to ourselves pursuant to Practice Book § 4023. We affirm the judgment of the trial court.

The trial court's memorandum of decision reveals the following facts. The Connecticut Unfair Trade Practices Act (CUTPA) prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b(a). The legislature did not codify a comprehensive list of "unfair or deceptive acts or practices," but rather articulated its intent that, in construing the scope of the statutory prohibition, "the [named defendant] and the courts . . . shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)) [prohibiting 'unfair or deceptive acts or practices'], as from time to time amended." General Statutes § 42-110b(b). The legislature delegated to the named defendant the authority to "establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of [CUTPA]." General Statutes § 42-110b(c). The named defendant's authority is limited, however, by the statutory requirement that her regulations "shall not be inconsistent with the rules, regulations and decisions of the federal trade

[1] The Connecticut department of consumer protection is also named as a defendant in this appeal.

commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act." General Statutes § 42-110b(c).

Pursuant to § 42-110b(c), the named defendant promulgated § 42-110b-19 of the Regulations of Connecticut State Agencies, that provides in pertinent part: "It shall be an unfair or deceptive act or practice to . . . (e) Advertise the availability of a manufacturer's rebate by displaying the net price of the advertised item in the advertisement, unless the amount of the manufacturer's rebate is provided to the consumer by the retailer at the time of purchase of the advertised item. A retailer will not be required to provide the purchaser of an advertised item with the amount of the manufacturer's rebate if the retailer advertises that a manufacturer's rebate is available without stating the net price of the item. For the purpose of this subsection, 'net price' means the ultimate price paid by a consumer after he redeems the manufacturer's rebate offered for the advertised item."

The plaintiff, a New York corporation engaged in the business of retail sales in Connecticut, instituted the present action, seeking a "permanent injunction staying the effectiveness of [Regulation § 41-110b-19(e)] and its enforcement." At trial, the plaintiff argued that the regulation is: (1) inconsistent with, and in excess of, the statutory authority granted to the named defendant; (2) in violation of substantive due process in that it is arbitrary and capricious; and (3) inconsistent with the protections that are afforded commercial speech pursuant to the federal and state constitutions.

In addressing these claims, the trial court made the following findings of fact with respect to manufacturers' rebate programs. Such a program is a marketing technique that purports to return a portion of the purchase price to the consumer after purchase. The terms and conditions of a manufacturer's rebate, including the amount of the rebate, are determined by the manufac-

turer. While the terms and conditions vary from manufacturer to manufacturer and from product to product, three basic conditions are common to each manufacturer's rebate program. In order to obtain the rebate from the manufacturer, the consumer must deliver to a designated address: (1) a completed rebate certificate; (2) the original cash register receipt; and (3) a valid proof of purchase. The rebate certificate and the cash register receipt are obtained from the retailer and the valid proof of purchase is typically part of the package or container purchased by the consumer.

The language of the advertisement of a product for which a manufacturer's rebate is offered is determined by the retailer. An important marketing tool used by retailers is the prominent advertisement of a product's net price, i.e., the price of the product after subtracting the rebate allowance. Such net price advertising quickly "grabs" the attention of the consumer. Advertisements by the plaintiff of products included in a manufacturer's rebate program display, in large type, the net price and, in small type, the regular price, the sale price and the amount of the manufacturer's rebate. The following is an example of the plaintiff's net price advertising:

$1 after 50¢ mfr. rebate *
reg. 2.99 sale 1.50

reg. 2.99 ea. sale
3/6.25 less 1.25 mfr. reb. * 3/$5

* See clerk for details/limitations on all rebates & special offers.

The trial court noted that such advertising is factually untrue because the consumer necessarily incurs costs in obtaining the rebate from the manufacturer. At the very least, the consumer must incur the expense of mailing the required items to the address designated by the manufacturer. In the advertisement reproduced above, therefore, the consumer pays, at the time of purchase, $1.50

for the advertised product and then incurs the cost of obtaining the 50 cent rebate. The trial court determined that the net price advertising is likely to mislead a consumer into believing that the price of the product is $1, a belief likely to affect the consumer's purchase decision.

The trial court concluded, therefore, that the plaintiff's net price advertising of a product included in a manufacturer's rebate program is "deceptive" as a matter of law. Accordingly, the court held that: (1) in promulgating the regulation at issue, the named defendant acted within the authority granted her by General Statutes § 42-110b(c); and (2) the advertising here at issue was not protected by the federal and state constitutions.

The plaintiff's appeal to this court raises three issues. First, the plaintiff contends that because its net price advertising of products included in a manufacturer's rebate program is not "deceptive" as a matter of law, the trial court improperly sustained the regulation. Second, the plaintiff claims that the trial court mistakenly determined that such net price advertising is not subject to constitutional protection. Finally, the plaintiff maintains that the trial court improperly refused to admit at trial certain evidence relevant to a determination of the statutory and constitutional validity of the regulation. We are unpersuaded.

I

We turn first to the plaintiff's claim that the challenged regulation is inconsistent with the statutory authority granted to the named defendant and, therefore, was improperly sustained by the trial court. The trial court determined that the plaintiff's net price advertising was "deceptive" as a matter of law. This finding served as the basis for the court's conclusion that, in promulgating the regulation, the named defendant acted within the authority granted her by § 42-110b(c). The plaintiff

claims that a proper application of the standards set forth by the federal trade commission compels a finding that its advertising is not "deceptive." Accordingly, argues the plaintiff, the regulation of its advertisements pursuant to § 42-110b is invalid. We conclude that the trial court properly sustained the regulation; we rely on different grounds than did the trial court, however, in reaching this conclusion.[2]

Initially, we note that the nature of the plaintiff's advertising is not the focus of our inquiry, nor should it have been in the trial court. At issue in this appeal is the validity of the regulation promulgated by the named defendant. " 'Judicial review of the [named defendant's] action is governed by the Uniform Administrative Procedure Act (General Statutes, c. 54, §§ 4-166 through 4-189), and the scope of that review is very restricted. *Lawrence* v. *Kozlowski*, 171 Conn. 705, [707-708,] 372 A.2d 110 (1976) [cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977)]. Neither this court nor the trial court may retry the case or substitute its own judgment for that of the [named] defendant.' *C & H Enterprises, Inc.* v. *Commissioner of Motor Vehicles*, 176 Conn. 11, 12, 404 A.2d 864 (1978); *DiBenedetto* v. *Commissioner of Motor Vehicles*, 168 Conn. 587, 589, 362 A.2d 840 (1975); see General Statutes § 4-183[j].[3] 'The

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[2] This court may rely upon different grounds from those relied upon by the trial court for the purpose of affirming the judgment. *Rubin* v. *Rubin*, 204 Conn. 224, 232, 527 A.2d 1184 (1987); *Pepe* v. *New Britain*, 203 Conn. 281, 292, 524 A.2d 629 (1987); *Heffernan* v. *New Britain Bank & Trust Co.*, 175 Conn. 8, 14, 392 A.2d 481 (1978).

[3] General Statutes § 4-183 (j) as amended to take effect July 1, 1989, provides: "The court shall not substitute its judgment for that of the agency as to weight of the evidence on questions of fact. The court shall affirm the decision of the agency unless the court finds that substantial rights of the person appealing have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions;

court's ultimate duty is only to decide whether, in light of the evidence, the [named defendant] has acted unreasonably, arbitrarily, illegally, or in abuse of [her] discretion.' *Burnham* v. *Administrator*, 184 Conn. 317, 322, 439 A.2d 1008 (1981); *Riley* v. *State Employees' Retirement Commission*, 178 Conn. 438, 441, 423 A.2d 87 (1979); see also *Persico* v. *Maher*, 191 Conn. 384, 409, 465 A.2d 308 (1983)." *Buckley* v. *Muzio*, 200 Conn. 1, 3, 509 A.2d 489 (1986); *New Haven* v. *Freedom of Information Commission*, 205 Conn. 767, 773, 535 A.2d 1297 (1988); see also *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 200 Conn. 489, 496, 512 A.2d 199, appeal dismissed, 479 U.S. 1023, 107 S. Ct. 781, 93 L.Ed. 2d 819 (1986). It is with an awareness of these limitations that we review the challenged regulation.

Since the early 1980s the state department of consumer protection has received consumer complaints about manufacturers' rebate programs. In response to these complaints, the named defendant conducted an investigation of these rebate programs. The trial court's findings, discussed supra, detailed the relevant findings made during this investigation. The ultimate conclusion reached by the named defendant and affirmed by the trial court was that net price advertising of a product for which a manufacturer's rebate is offered misleads the consumer about the price the consumer will pay for that product.

The federal courts have determined that an act or practice is deceptive[4] if three requirements are met. "First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the con-

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(2) in excess of the statutory authority of the agency; (3) made upon unlawful procedure; (4) affected by other error of law; (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . ."

[4] The parties focus solely on "deception" rather than "unfairness."

sumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material—that is, likely to affect consumer decisions or conduct." *Figgie International, Inc.*, 107 F.T.C. 313, 374 (1986). Given the findings concerning the inherently misleading nature of net price advertising where a manufacturer's rebate is involved, the named defendant, pursuant to § 42-110b(c), established by regulation that such advertising is in violation of CUTPA.

We conclude that in light of the evidence the regulation is consistent with the general statutory scheme that it is designed to implement. The limitations imposed on the named defendant's authority by the express language of § 42-110b do not require a contrary conclusion. First, in accordance with the mandate of § 42-110b(c), the regulation is not "inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act." Although the federal authorities have not established the net price advertising here at issue to be "unfair or deceptive," they have also not adopted rules, regulations or decisions with which the challenged regulation is inconsistent.[5] Likewise, although § 42-110b(b) provides that courts and the named defendant shall be *guided by* the federal interpretations given § 5 of the Federal Trade Commission Act, they are not limited by such interpretations. "As originally enacted, [CUTPA] provided that state unfair or deceptive acts or practices were to be those '*determined to be*' unfair or deceptive by the [Federal Trade Commission] or the federal courts.

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[5] The plaintiff claims that a letter received by the named defendant in 1986 from a Federal Trade Commission staff employee is inconsistent with the challenged regulation. We find no such inconsistency. The letter merely declines to undertake a study or to make reports or policy statement regarding rebates. By this action, the Federal Trade Commission did not commence the most basic steps that could lead to the issuance of a rule, regulation or decision.

1973 Pub. Acts 615, § 2(a). However, the Act was amended in 1976 to provide only that courts in Connecticut [and the named defendant] were to be '*guided by*' federal interpretations of § 5 of the [Federal Trade Commission Act]. The purpose of the change apparently was to permit . . . practices which had not yet been specifically declared unlawful by federal authorities to be nevertheless unlawful under CUTPA." (Emphasis added.) *Bailey Employment System, Inc.* v. *Hahn*, 545 F. Sup. 62, 71 (D. Conn. 1982).

Further support for the conclusion that the regulation is consistent with the named defendant's statutory authority derives from the fact that the regulation has received approval from the standing legislative regulation review committee as required by General Statutes § 4-170. Section § 4-170 provides in part that "[n]o adoption, amendment or repeal of any regulation . . . shall be effective until the original of the proposed regulation approved by the attorney general, as provided in section 4-169 . . . . [has] been submitted to the standing legislative regulation review committee . . . . The committee shall review all proposed regulations and, in its discretion . . . may approve [or] disapprove . . . any such regulation." "[L]egislative ratification of a proposed regulation supports the position that the regulation is consistent with the general statutory scheme that the regulation was designed to implement." *Texaco Refining & Marketing Co.* v. *Commissioner*, 202 Conn. 583, 600, 522 A.2d 771 (1987); see also *Phelps Dodge Copper Products Co.* v. *Groppo*, 204 Conn. 122, 129-30, 527 A.2d 672 (1987); *Connecticut Hospital Assn., Inc.* v. *Commission on Hospitals & Health Care*, 200 Conn. 133, 144, 509 A.2d 1050 (1986).

The named defendant, therefore, acted within her statutory grant of authority in establishing net price advertising in the context of a manufacturer's rebate program as "unfair or deceptive" in violation of CUTPA.

That the named defendant did not eliminate the practice of net price advertising entirely, but rather chose to regulate the area more narrowly, does not render the regulation invalid. "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612-13, 66 S. Ct. 758, 90 L. Ed. 888 (1946). The named defendant, relying on her expertise in the area, determined that an effective way to address the inherently misleading nature of net price advertising in the context of manufacturers' rebate programs is to require those retailers who choose to use that type of advertising to make the rebate available at the time of purchase. We may not substitute our own judgment for that of the named defendant.

We conclude that, in promulgating § 42-110b-19(e) of the regulations, the named defendant did not act unreasonably, arbitrarily, illegally, or in abuse of her discretion. The trial court, therefore, properly determined that the adoption of the regulation was consistent with General Statutes § 42-110b.

II

We turn next to the plaintiff's claim that the regulation violates its right to free speech under the first amendment to the United States constitution and article first, §§ 4 and 5 of the Connecticut constitution. As both the plaintiff and the defendants concede, the net price advertising here at issue falls within the classification of "commercial speech."[6] "The United States Supreme

[6] In determining the protection afforded commercial speech by the state constitution, we are guided by the United States Supreme Court's decisions in this area. *Grievance Committee* v. *Trantolo*, 192 Conn. 15, 23, 470 A.2d 228 (1984).

Court has 'adopted a four-part test for determining the validity of government restrictions on commercial speech . . . . (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and *is not misleading.* A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.' *Metromedia, Inc.* v. *San Diego,* [453 U.S. 490, 507, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]." (Emphasis added.) *Burns* v. *Barrett,* 212 Conn. 176, 182, 561 A.2d 1378, cert. denied, —— U.S. ——, 110 S. Ct. 563, 107 L. Ed. 2d 558 (1989).

We need not go beyond the first of these criteria. As we discussed previously, the named defendant's investigation yielded a finding that net price advertising of a product for which a manufacturer's rebate is offered is inherently misleading. As such, the plaintiff's advertising does not qualify for constitutional protection.

III

Finally, the plaintiff challenges the trial court's refusal to admit into evidence examples of other retailers' net price rebate advertising. In offering the evidence, the plaintiff stated that the evidence was relevant to the issue of "deception" as set forth in its statutory challenge to the regulation and the issue of overbreadth as set forth in its constitutional challenge to the regulation. The court rejected the offer, stating that the form and substance of an advertisement of a competitor of the plaintiff was irrelevant to the controversy. The plaintiff claims that the court improperly focused only on the plaintiff's advertising. We do not agree.

"It is beyond dispute that the trial court has broad discretion in determining the relevancy and materiality of evidence. *Hardisty* v. *Hardisty,* 183 Conn. 253, 257,

439 A.2d 307 (1981)." *Web Press Services Corporation* v. *New London Motors, Inc.*, 203 Conn. 342, 355, 525 A.2d 57 (1987). The plaintiff first offered the examples of other retailers' advertising on the issue of "deception." As discussed previously, the question properly before the trial court was not whether a particular advertisement was deceptive as a matter of law, but rather, whether the named defendant's regulation was unreasonable, arbitrary, illegal, or in abuse of her discretion. The plaintiff also offered the evidence on its claim that the regulation was unconstitutionally overbroad. The United States Supreme Court has been reluctant, however, to apply the overbreadth analysis in the context of commercial speech. See *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 379-81, 97 S. Ct. 2691, 53 L. Ed. 2d 810, reh. denied, 434 U.S. 881, 98 S. Ct. 242, 54 L. Ed. 2d 164 (1977). We conclude that the trial court did not abuse its broad discretion in precluding at trial examples of other retailers' net price rebate advertising.

The judgment of the trial court is affirmed.

In this opinion PETERS, C. J., CALLAHAN and GLASS, Js., concurred.

COVELLO, J., dissenting. I respectfully disagree with the majority's conclusion that "the advertising here at issue was not protected by the federal and state constitutions." This conclusion is based upon the trial court's factually unsupported determination that net price advertising, in the context of a manufacturer's rebate program, was inherently "unfair or deceptive," and that, therefore, pursuant to General Statutes § 42-110b(c), such advertising is in violation of the Connecticut Unfair Trade Practices Act (CUTPA). I submit that the defendant is required to make some showing of unfairness or deception beyond a mere conclusion, particularly when the first amendment guarantee of free speech is implicated.

Despite the implication to the contrary found in the majority's opinion, I submit that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger* v. *Youngs Drug Products Corporation*, 463 U.S. 60, 71 n.20, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983). (Citations omitted.) Here, there was simply no evidence in the record at trial to show that the defendant had received any complaints suggesting that net price advertising was deceptive because the consumer expected to receive the advertised net price from the retailer at the point of purchase. Michael Krauss, the plaintiff's director of consumer and government relations, testified that over the course of eight years he did not receive a single complaint regarding a consumer's inability to receive the rebate amount in the store, or the net price. Krauss' testimony was corroborated by Kathleen Curry, consumer affairs bureau chief for the defendant. Complaints from consumers about rebate offers related exclusively to the process involved in obtaining the rebate, *not the advertising of the rebate itself*. As a threshold matter, the evidence on the record is wholly insufficient to support the conclusion that there is a likelihood or a fair probability that a reasonable consumer would be misled or deceived by the net price advertising format at issue here. See *Figgie International, Inc.*, 107 F.T.C. 313, 373-74 (1986).

General Statutes § 42-110b(b) provides that the courts and the defendant shall be guided by the federal interpretations given § 5 of the Federal Trade Commission Act. Federal authorities have *not* established that the net price advertising here at issue is "unfair or deceptive," and the FTC in the past has declined the named defendant's request that the FTC undertake a study, report or policy statement regarding rebates. The majority's statement, that "although § 42-110b(b) provides that courts and the named defendant shall be *guided by* the Federal interpretations given § 5 of the Federal Trade Commission Act, they are not limited by such in-

terpretations" (emphasis in original) is an inappropriate attempt to justify the conclusory, unsupported and therefore clearly erroneous determination of the trial court. *Season-All Industries, Inc.* v. *R. J. Grosso, Inc.*, 213 Conn. 486, 498, —— A.2d —— (1990).

This regulation unconstitutionally restricts the dissemination of what I perceive to be truthful commercial speech. " 'Even though "commercial" speech is involved, [this kind of restriction] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that [the] government chooses to give them.' " *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 351, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986) (Brennan, J., dissenting), quoting *Central Hudson Gas & Electric Corporation* v. *Public Service Commission*, 447 U.S. 557, 574-75, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). "[N]o differences between commercial and other kinds of speech justify protecting commercial speech less extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities." *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, supra.

Accordingly, I dissent.

SUPERIOR COURT
JUDICIAL DISTRICT OF HARTFORD/
NEW BRITAIN AT HARTFORD

No. CV-89-0355671

CALDOR, INC.

v.

MARY M. HESLIN, COMMISSIONER OF THE DEPARTMENT OF CONSUMER PROTECTION, AND STATE OF CONNECTICUT DEPARTMENT OF CONSUMER PROTECTION

MEMORANDUM OF DECISION

(April 26, 1989)

In this action, Caldor, Inc., plaintiff, seeks a "permanent injunction staying the effectiveness of [Conn. Reg. § 41-110b-19(e)] and its enforcement"; and it seeks such "other relief, legal or equitable as the court deems appropriate."

Plaintiff is a New York corporation engaged in the business of retail sales at 31 locations in Connecticut and 88 locations in seven other states.

Defendant, Mary Heslin (Commissioner) is the Commissioner of co-defendant Department of Consumer Protection of Connecticut.

The Commissioner, pursuant to Conn. Gen. Stat. § 42-110b, has the authority to establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of the Connecticut Unfair Trade Practices Act (CUTPA).

Conn. Gen. Stat. § 42-110b(c) states:

> "(c) The commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations, and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act."

Pursuant to said statutory authority, the Commissioner promulgated a regulation which established as unfair or deceptive certain acts or practices in the advertising of manufacturer's rebates. Effective January 1, 1989, § 42-110b-19 provides in pertinent part:

> "It shall be an unfair or deceptive act or practice to . . . (e) advertise the price of merchandise or service at a price which reflects the price of an item after the purchaser's redemption of an offered manufacturer's rebate, unless the seller provides the purchaser with the cash amount of the rebate at the time of purchase."

It is the stated purpose of said subsection (e) "[to] require retailers which advertise the net price of an item after deduction of a manufacturer's rebate to pay consumers the amount of such rebate at the time of purchase."

Plaintiff claims: "The rebate regulation, as written, is invalid in one or more of the following ways:

(a) The regulation is inconsistent with protections that are afforded commercial speech pursuant to the First Amendment of the United States Constitution and §§ 4 and 5 of the Connecticut Constitution.

(b) The regulation is inconsistent with, and in excess of, the statutory authority granted to the defendants to promulgate such a regulation.

(c) The regulation is in violation of substantive due process in that it is arbitrary and capricious."

Each of these claims should be rejected.

In challenging the constitutionality of the regulation, plaintiff has a "heavy burden of proof; the unconstitutionality must be proven beyond all reasonable doubt." *Bottone* v. *Westport*, 209 Conn. 652, 657.

"The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, see *Friedman* v. *Rogers*, 440 U.S. 1 (1979), or that proposes an illegal transaction, see *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376 (1973). Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 638; *Central Hudson Gas & Electric* v. *Public Serv. Commin.*, 447 U.S. 557, 561-566; *Grievance Committee* v. *Trantolo*, 192 Conn. 15, 24-26.

A manufacturer's rebate program is a marketing technique. Experience has shown that redemptions of a manufacturer's rebate is, at the highest, approximately at the rate of 85%. The low percentage of redemptions is an essential factor in a manufacturer's rebate program.

Terms and conditions of a manufacturer's rebate, including the amount of the rebate, are determined by the manufacturer, not by the retailer. A manufacturer advertises the brand but it does not advertise the price. Language of the advertisement of a product, which is included in a manufacturer's rebate program, is determined by the retailer; the manufacturer may provide the retailer with funds for advertising such a product. Therefore, the decision to advertise the net price of a product,

which is included in a manufacturer's rebate program, is made by the retailer.

In a manufacturer's rebate program for a particular product, the terms and conditions of the rebate are the same. However, the terms and conditions of a program may vary from manufacturer to manufacturer and may vary from product to product.

There are three basic conditions which each manufacturer usually includes in each program. In order to obtain the rebate from the manufacturer, the consumer must deliver to a designated address (1) a completed rebate certificate, (2) the original cash register receipt, and (3) a valid proof of purchase. The rebate certificate and the cash register receipt are obtained from the retailer; the valid proof of purchase is usually part of the package or container.

Invariably the consumer must incur the expense of mailing said three times. The minimum expense of mailing is the cost of a stamp, i.e. 25 cents. Therefore, if the manufacturer's rebate is one dollar, the consumer will spend a minimum of 25 cents to collect one dollar.

Advertising the net price is important to the retailer as a marketing tool. The purpose of prominently advertising the net price is to "grab" the attention of the consumer quickly.

For the purposes of a manufacturer' (sic) rebate program, net price means the price of the product after subtracting the rebate allowance. Advertisements by plaintiff, of products included in a manufacturer's rebate program, display, in large type, the net price, i.e. the amount of the price after the manufacturer's rebate and in small type, the sale price, the price before sale and the amount of the manufacturer's rebate. The following is an example of such an advertisement by plaintiff:

$1 after 50¢ mfr. rebate *
reg. 2.99 sale 1.60

reg. 2.99 ea. sale
3/6.25 less 1.25 mfr. reb. * 3/$5

* See clerk for details/limitations on all rebates & special offers.

Plaintiff claims that it is too costly for it to process the redemption at the point of purchase and that it cannot act for the consumer in processing the redemption; and, therefore, the regulation forces the plaintiff not to advertise the net price or it forces the plaintiff not to participate in such programs. It claims that enforcement of the regulation will result in a loss to it of $1.5 million in gross sales and lost profit of 23% of said gross sales.

In construing the regulation, this court is guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1). § 42-110b(b) of the General Statutes.

"The Commission will find an act or practice deceptive if three requirements are met. First, there must be a representation, omission, or other practice likely to mislead consumers. Second, the consumers must interpret the message reasonably under the circumstances. Third, the misleading representation, omission, or practice must be material—that is, likely to affect consumer decisions or conduct. Our deception analysis focuses on risk of consumer harm; actual injury to consumer need not be proved." (footnotes omitted) *Figgie International, Inc.*, 107 FTC 313; *Cliffdale Associates, Inc. et al.* 103 FTC 165.

In the opinion of this court, net price advertising by plaintiff of products in a manufacturer's rebate program is deceptive under the FTC standards. Such advertising is factually untrue. In the advertisement reproduced

herein, the consumer who purchases that product does not pay $1 for the product; rather the consumer pays $1.50 plus the cost of obtaining the .50¢ rebate. A consumer reasonably reading said advertising is likely to be misled into thinking that the cost for the product is $1. However, after receipt of the rebate, the consumer will have paid $1 plus the cost of mailing. Price is material to the consumer; price is likely to affect the consumer's decision. It is not relevant that a consumer has not suffered an actual injury; nor is the intent of the retailer relevant.

Plaintiff's advertisement of the net price is deceptive advertising and it is not protected by the First Amendment of the United States Constitution and §§ 4 and 5 of the Connecticut Constitution.

The regulation is consistent with the authority granted to the Commission under § 42-110b of the General Statutes and it is not arbitrary and capricious.

Accordingly, judgment is hereby rendered for defendants.

/s/ Ronald J. Fracasse
RONALD J. FRACASSE
Judge

STATE OF CONNECTICUT
SUPERIOR COURT
JUDICIAL DISTRICT HARTFORD/NEW BRITAIN
AT HARTFORD

#CV-89 35 56 71

CALDOR, INC., a New York corporation with an office in Norwalk, Connecticut

vs.

MARY HESLIN, COMMISSIONER of the Department of Consumer Protection, of the State of Connecticut; and STATE OF CONNECTICUT DEPARTMENT OF CONSUMER PROTECTION, an agency of the State of Connecticut

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Present: HONORABLE RONALD J. FRACASSE, Judge

JUDGMENT

April 28, 1989

This action, by writ and complaint as amended seeking a permanent injunction staying the effectiveness and the enforcement of Conn. Reg. § 41-1106-19(e) which regulates the advertisement of prices of merchandise when rebates are involved, and for equitable relief, came to this Court on the 14th day of February, 1989, and thence to later dates when the parties appeared and were at issue, as on file, and thence to the present time.

The Court, having heard the parties, finds the issues for the defendants.

WHEREUPON, it is adjudged that judgment enter in favor of the defendants.

BY THE COURT

/s/ Jonathan W. Field
JONATHAN W. FIELD
First Assistant Clerk

Excerpt of Testimony of Kathleen Curry,
Consumer Affairs Bureau Chief
(Dated February 23, 1989)

After direct and cross, questions posed by the court:

THE COURT: I just want to ask you one more question. The advertisement stated a sale price of five dollars, manufacturer's rebate of one dollar.

MS. CURRY: Um hum.

THE COURT: And then it went on to state after a cost to the consumer of fifty cents.

MS. CURRY: Um hum.

THE COURT: In obtaining the rebate, the net price to the consumer will be fifty cents. Is that—would that kind of an advertisement require the retailer to pay—I'm sorry—to charge only fifty cents at the register?

MS. CURRY: Um hum.

THE COURT: But that is a full disclosure, or—I don't see anything misleading about that. It does use the magic words of net price. And it does advertise the availability of the manufacturer's rebate. It also specifies the cost to get the rebate.

MS. CURRY: Um hum.

THE COURT: And it does the arithmetic for the consumer, to tell them what you're going to end up paying after you pay the mailing charges of fifty cents, you're going to end up with a fifty cent rebate.

MS. CURRY: So in that situation the net price is—

THE COURT: Is a net.

MS. CURRY: Computes the net price.

THE COURT: It computes the expense.

MS. CURRY: Um hum.

THE COURT: But it uses the magic word, net price.

MS. CURRY: Yep. That would be accurate. You know, that would be accurate. It sounds like, from what you're describing, that that would be an accurate representation.

THE COURT: But in spite of the fact that it is not misleading, this regulation would still require the retailer to charge—to collect openly a certain amount at the register?

MS. CURRY: If he were to advertise that way, yes it would.

THE COURT: Even though there's nothing misleading about the ad?

MS. CURRY: No. That's right.

* * * *

(2)

No. 90-989

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

CALDOR, INC.,
Petitioner,

v.

MARY M. HESLIN, COMMISSIONER OF CONSUMER PROTECTION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTION PRESENTED

Whether the decision below is inconsistent with this Court's decision in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, ____ U.S. ____, 110 S. Ct. 2281 (1990)?

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No. 90-989

In The

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

STATEMENT OF THE CASE

The Connecticut Unfair Trade Practices Act ("CUTPA") prohibits the use of unfair or deceptive acts or practices in the conduct of trade or commerce. Conn. Gen. Stat. § 42-110b(a).[1] The legislature delegated to the respondent, the Commissioner of Consumer Protection, authority to establish

[1] "[Conn. Gen. Stat.] Sec. 42-110b. Unfair trade practices prohibited. Legislative intent. (a) No person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."

by regulation those acts, practices or methods which shall be deemed to be unfair or deceptive in violation of CUTPA. Conn. Gen. Stat. § 42-110b(c).[2] The Commissioner, acting pursuant to this authority, promulgated the challenged regulation, which establishes as unfair or deceptive certain acts or practices in the advertising of manufacturer's rebates. *Caldor v. Heslin*, 215 Conn. 590, 591-92 (1990) (Pet. App. 2a, 3a).

Manufacturers' rebate programs have been the source of consumer complaints to the Department of Consumer Protection since the early 1980's. In response to these complaints, the Commissioner conducted an investigation of these rebate programs (T. 2-23-89 p. 23); *Caldor v. Heslin*, 215 Conn. at 597 (Pet. App. 7a). In 1988, the Department proposed to adopt a regulation regarding net price advertising (T. 2-23-89 pp. 29-31). Subsequent to a public hearing (Defendant's Exhibit 3), the Commissioner of Consumer Protection adopted 9 Reg. Conn. Agencies, DCP § 42-110b-19(e) (1988) (Defendant's Exhibit 1); *Caldor v. Heslin*, 215 Conn. at 592 (Pet. App. 3a), which became effective December 7, 1988 and provides:

> It shall be an unfair or deceptive act or practice to:
>
> (e) Advertise the availability of a manufacturer's rebate by displaying the net price of the advertised item in the advertisement, unless the amount of the manufacturer's rebate is provided to the consumer by the retailer at the time of purchase of the advertised item. A retailer will not be required to provide the purchaser of an advertised item with the amount of the manufacturer's rebate if the retailer advertises that a manufacturer's rebate is available without

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[2] "[Conn. Gen. Stat. § 42-110b(c)] The Commissioner may, in accordance with chapter 54, establish by regulation acts, practices or methods which shall be deemed to be unfair or deceptive in violation of subsection (a) of this section. Such regulations shall not be inconsistent with the rules, regulations and decisions of the federal trade commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act."

> stating the net price of the item. For the purpose of this subsection, "net price" means the ultimate price paid by a consumer after he redeems the manufacturer's rebate offered for the advertised item.

This regulation requires those retailers who choose to use net price advertising to make the rebate available at the time of purchase. The regulation does not apply to or restrict advertising of rebate availability, the amount of the rebate available, that a product is on sale, and the price of the product (T. 1-24-89 p. 105); 9 Reg. Conn. Agencies, DCP § 42-110b-19(e).

TRIAL COURT PROCEEDINGS

The petitioner brought an action in the Connecticut Superior Court seeking a permanent injunction restraining the respondent from enforcing this regulation against the petitioner. The petitioner claimed that the Commissioner exceeded her statutory authority in adopting the regulation, and that the regulation violated substantive due process and the First Amendment. *Caldor v. Heslin*, 215 Conn. at 592–93 (Pet. Brief 3).

The record of the administrative proceedings leading to adoption of the regulation was admitted at trial (Defendant's Exhibit 3). Examples of the petitioner's net price advertising (Plaintiff's Exhibit 1), a competing retailer's net price advertising (Plaintiff's Exhibit 2), testimony regarding the petitioner's advertising and use of manufacturers' rebates as a marketing technique, and the industry-wide operation of manufacturers' rebate programs (T. 1-24-89) was admitted into evidence. Testimony by the respondent's designee regarding the Commissioner's adoption of the regulation was presented (T. 2-23-89).

This evidence demonstrated that a rebate program is a marketing technique which purports to return a portion of the purchase price to the consumer after purchase. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 3a). To obtain the rebate,

the consumer must obtain, complete and deliver to a designated address, at his own expense, a rebate certificate, the original cash register receipt and a valid proof of purchase. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 4a). Consumers must invariably incur the cost of obtaining the rebate, which at a minimum includes the cost of mailing, *Caldor v. Heslin*. 215 Conn. at 594 (Pet. App. 4a), but often includes other expenses.

Additional barriers to obtaining the rebate exist. A consumer may be required to return the item being replaced, such as a shower head, where the cost of mailing equalled the amount of rebate offered (T. 2-23-89 p. 26). Some consumers were required to cut cans a certain way or to soak bottles in water for three days in order to remove the proof of purchase labels (T. 2-23-89 p. 26). A consumer who purchases a plastic bottle of motor oil is required to destroy the container by cutting open the bottle to obtain the proof of purchase (T. 1-24-89 pp. 109–110). Many rebate promotions limit the amount or number of rebates available to a consumer (T. 1-24-89 pp. 23, 68), and impose a time limitation within which all redemption requirements must be met (T. 1-24-89 p. 110). This time period limitation can leave the consumer with the option of using the product within this time period or transferring the product to another container so that the proof of purchase may be cut out of the container, or "you have the option not to take advantage of the [rebate] offer." (T. 1-24-89 p. 111).

Prominently advertising a product's net price after subtracting the rebate allowance is important to the retailer as a marketing technique. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 4a, 18a). Net price advertising "grabs" the consumers' attention quickly. *Caldor v. Heslin*, 215 Conn. at 593 (Pet. App. 4a, 18a).

A low percentage of redemptions is an essential factor in a manufacturer's rebate program. (Pet. App. 17a). The redemption rate for 5200 rebate promotions in 1988 was forty

percent (T. 1-24-89 pp. 145, 151). The highest redemption rate has been eighty-five percent for a $12.00 rebate, (Pet. App. 17a), and this rate is "almost unheard of." (T. 1-24-89 p. 15). For a $1.00 rebate, the redemption rate was ten to fifteen percent (T. 1-24-89 p. 14). Manufacturers assume a redemption rate of less than one hundred percent (T. 1-24-89 p. 14). If too many consumers redeem the rebates, then rebates lose their effectiveness as a marketing tool (T. 2-23-89 p. 51); (T. 1-24-89 pp. 44, 50).

The trial court found that consumers necessarily incur costs in obtaining the rebate from the manufacturer. *Caldor v. Heslin*, 215 Conn. at 594 (Pet. App. 4a). The advertised net price does not reflect these costs to the consumer (T. 1-24-89 p. 46). The trial court found that the petitioner's net price advertising is "factually untrue" and deceptive as a matter of law. (Pet. App. 19a). The trial court held that the regulation is consistent with the statutory authority granted to the Commissioner and is not arbitrary and capricious. (Pet. App. 20a). The trial court held that the petitioner's net price advertising is deceptive advertising and not protected commercial speech. (Pet. App. 20a). Judgment entered for the respondents.

APPELLATE PROCEEDINGS

On appeal, the petitioner raised three claims. First, it challenged the trial court's sustaining the regulation upon a finding that the petitioner's net price advertising is factually untrue and deceptive as a matter of law. Secondly, the petitioner claimed that the trial court mistakenly determined that its net price advertising is not subject to protections afforded commercial speech. Finally, the petitioner claimed error in some of the trial court's evidentiary rulings. *Caldor v. Heslin*, 215 Conn. at 594-95 (Pet. App. 5a).

The Connecticut Supreme Court determined that the petitioner's net price advertising is deceptive and, therefore,

the respondent did not exceed her statutory authority by regulating this advertising. *Caldor v. Heslin*, 590 Conn. at 599 (Pet. App. 9a). The Connecticut Supreme Court held that net price advertising is inherently misleading and, as such, does not qualify for constitutional protection afforded commercial speech. *Caldor v. Heslin*, 215 Conn. at 600 (Pet. App. 11a). Finally, the Connecticut Supreme Court upheld the trial court's exclusion of certain evidence. *Caldor v. Heslin*, 215 Conn. at 601-02 (Pet. App. 11a-12a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

A. The Decision Below Is Not Inconsistent With This Court's Decision In *Peel v. Attorney Registration and Disciplinary Commission of Illinois.*

The petitioner claims that the Connecticut Supreme Court's review of the petitioner's advertising was inadequate under *Peel v. Attorney Registration and Disciplinary Commission of Illinois,* ____ U.S. ____, 110 S. Ct. 2281 (1990). In *Peel,* this Court reversed the Illinois Supreme Court's ruling that the lawyer advertising in issue was not entitled to First Amendment protections. This Court did not consider the constitutional adequacy of the manner in which the Illinois court reviewed this advertising. For several reasons, *Peel* provides no support for the petitioner's claim that the Connecticut Supreme Court's review of its advertising was constitutionally inadequate.

Peel came to this Court with a radically different procedural history than this case came to the Connecticut Supreme Court. *Peel* did not involve review of an administrative agency's or lower court's findings of deception. Neither the Illinois Commission, nor any trial court, nor the Illinois Supreme Court made any findings that the advertising in issue was deceptive. 110 S. Ct. at 2288. It was undisputed that the facts stated in the advertising were true and verifiable. 110 S. Ct. at 2288. Illinois justified its absolute ban[3]

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[3] The Connecticut regulation does not prohibit net price advertising entirely, but rather regulates the area "more narrowly." *Caldor v. Heslin,* 215 Conn. at 599 (Pet. App. 10a). The issue in *Peel* was whether Illinois could "categorically prohibit" the lawyer advertising in issue. 110 S. Ct. at 2287. The majority of this Court rejected Illinois' absolute ban on this

(continued)

on this truthful advertising by claiming that this advertising was "potentially misleading." This Court undertook a review of whether the advertising was potentially misleading. This Court did not review any agency's or lower court's findings that the advertising was actually or inherently misleading.

Unlike *Peel*, where no prior determination of deception had been made, in this case, "[t]he ultimate conclusion reached by the named defendant and affirmed by the trial court was that net price advertising of a product for which a manufacturer's rebate is offered misleads the consumer about the price the consumer will pay for that product." *Caldor v. Heslin*, 215 Conn. at 597 (Pet. App. 7a). The Connecticut Supreme Court was called upon to review this conclusion on appeal.

In contradistinction to *Peel*, in this case the petitioner claimed that the respondent had exceeded her statutory authority in adopting the regulation because the regulated advertising is not unfair or deceptive.[4] In reviewing this nonconstitutional challenge to the regulation, the Connecticut Supreme Court properly applied the standard for reviewing administrative agency action, which requires the court to determine whether, in light of the evidence, the agency acted unreasonably, arbitrarily, illegally, or in abuse of discretion. *Caldor v. Heslin*, 215 Conn. at 596 (Pet. App. 7a).

In upholding the respondent's determination that net price advertising is deceptive and, therefore, properly regulated by the Commissioner of Consumer Protection under

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[3] *(continued)*
advertising. Two members of the majority would have allowed Illinois to enact regulations, other than a total ban, "to ensure that the public is not misled by such representations." 110 S. Ct. at 2293 (Marshall, J., concurring).

[4] The trial court's finding that the petitioner's net price advertising is deceptive as a matter of law "served as the basis" for the court's conclusion that, in promulgating the regulation, the respondent acted within her statutory authority. *Caldor v. Heslin*, 215 Conn. at 595 (Pet. App. 5a).

CUTPA, both the trial court and the Connecticut Supreme Court engaged in a constitutionally adequate review of the petitioner's advertising under the First Amendment.

Evidence presented in the trial court included the record of the agency proceedings, the petitioner's advertising, a competitor's advertising, testimony regarding the petitioner's advertising and use of manufacturers' rebates as a marketing tool, testimony regarding the industry-wide operation of these rebate programs, and testimony by the respondent's designee regarding the Commissioner's adoption of the regulation.

In its decision, the Connecticut Supreme Court specifically noted the trial court's finding that the petitioner's net price advertising is "factually untrue," 215 Conn. at 594 (Pet. App. 4a), and considered other trial court findings which "detailed the relevant findings made during [the Commissioner's] investigation." 215 Conn. at 597 (Pet. App. 7a). The Connecticut Supreme Court did not overturn these findings, which were challenged on appeal by the petitioner. These findings were the basis for the "ultimate conclusion" reached by the Commissioner, and affirmed by the trial court, that net price advertising "misleads the consumer about the price the consumer will pay for the product." 215 Conn. at 597 (Pet. App. 7a). After reciting the legal standard for evaluating whether advertising is deceptive, 215 Conn. at 597 (Pet. App. 7a–8a), the Connecticut Supreme Court concluded "that *in light of the evidence*, the regulation is consistent with the general statutory scheme that it is designed to implement." 215 Conn. at 597 (Pet. App. 8a) (emphasis added).

Thus, the petitioner's statement that the Connecticut Supreme Court "did not perform any independent analysis as to whether the advertising was misleading" (Pet. Brief at 6) is simply not true. *Peel* does not preclude state appellate courts from properly exercising First Amendment review of an administrative agency's and trial court's determinations of deception, while applying accepted standards for judicial review of agency regulations. Federal courts have followed

this approach in reviewing Federal Trade Commission regulation of deceptive practices. *See, e.g., Harry and Bryant Co. v. FTC,* 726 F.2d 993 (4th Cir.), *cert. denied,* 469 U.S. 820, 105 S. Ct. 91 (1984) (Rejecting challenge to regulations based upon claimed insufficiency of evidence in the administrative record and violation of commercial speech protections). The petitioner's writ presents no novel or significant issues in this regard.

Furthermore, the petitioner's reliance on *Peel* for its claim that the Connecticut Supreme Court's decision "will create radical disparities in First Amendment protections from State to State" (Pet. Brief 12-13) is misplaced. While Illinois had ruled that the advertising in issue was not protected, other states had ruled to the contrary. 110 S. Ct. at 2291 n. 16. Here, the petitioner argues that "there is no past experience, evidence, or precedent, nor any other state with a similar regulation." (Pet. Brief at 8). Thus, the question presented by the petitioner is not of nationwide importance. The petitioner makes no attempt to establish a conflict among courts in ruling on whether regulation of net price advertising similar to Connecticut's is constitutional.

B. The Connecticut Supreme Court Correctly Held That The Petitioner's Net Price Advertising Is Not Entitled To First Amendment Protections.

It is well recognized that the states and the federal government may restrict or prevent the dissemination of commercial speech that is false, deceptive or misleading. *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 638, 105 S. Ct. 2265, 2275 (1985); *Friedman v. Rogers,* 440 U.S. 1, 9, 99 S. Ct. 887, 894 (1979). Untruthful speech, commercial or otherwise, has never been protected. *Friedman v. Rogers,* 440 U.S. at 9, 99 S. Ct. at 894; *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340, 94 S. Ct. 2997, 3007 (1974); *Konigsberg v. State Bar,* 366 U.S. 36, 49 n. 10, 81 S. Ct. 997, 1006 n. 10 (1961). "The government may ban forms of communication more

likely to deceive the public than to inform it." *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350 (1980) (citations omitted).

As discussed above, the Connecticut Supreme Court properly sustained the trial court's findings that the petitioner's net price advertising is both "factually untrue" and "deceptive under the FTC standards." Because it is misleading, this advertising enjoys no First Amendment protection. *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 1002 (4th Cir.), *cert. denied*, 469 U.S. 820, 105 S. Ct. 91 (1984) (FTC regulation of funeral sales practices).

In ruling that deceptive commercial speech enjoys no First Amendment protection, the Connecticut Supreme Court followed an unbroken line of authority. *E.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830 (1976) ("obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a state dealing effectively with this problem."); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S. Ct. 2265, 2275 (1985) ("The State and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . ."); *In Re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 937 (1982) ("misleading advertising may be prohibited entirely").

II. THE PETITIONER'S ARGUMENT IS WITHOUT MERIT, REGARDLESS OF THE APPROACH USED IN THE DECISION BELOW.

Even if some retailer's net price advertising is entitled to First Amendment protections, the decision below upholding the respondent's regulation is correct.

A. The Petitioner Cannot Successfully Attack The Regulation As Being Overbroad.

The petitioner complains that the regulation is overbroad, because a retailer publishing a hypothetical advertisement making "every conceivable disclosure associated with rebates" would be subject to the regulation (Pet. Brief 8). Notwithstanding any such hypothetical disclosures, the prominently displayed net price is *not* the true ultimate price the consumer has paid for the product after obtaining the rebate. The First Amendment does not require states "to allow deceptive or misleading commercial speech whenever the publication of additional information can clarify or offset the effects of the spurious communication." *Friedman v. Rogers*, 440 U.S. 1, 12 n. 11, 99 S. Ct. 887, 895 n. 11 (1979).

Nevertheless, the petitioner's claim that the regulation is overbroad is unavailing. The overbreadth analysis does not apply to commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 379-81, 97 S. Ct. 2691, 2707-08 (1977); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 n. 20, 98 S. Ct. 1912, 1922 n. 20 (1978). *See also Board of Trustees of State University of New York v. Fox*, ____ U.S. ____, 109 S. Ct. 3028, 3036-37 (1989).

Moreover, the petitioner waived any right it may have had to challenge the regulation as being overbroad. The original complaint included a claim for a declaratory judgment of facial unconstitutionality. The petitioner subsequently amended its pleadings and abandoned this claim (T. 1-25-89 p. 2); (R. 5-7). It proceeded to trial only on the claim that the regulation is unconstitutional as applied to its advertising, seeking injunctive relief solely in favor of the petitioner. No evidence of any advertisement making the petitioner's hypothetical disclosures was introduced at trial or in the administrative proceedings. The petitioner's advertisements offered at trial did not provide such disclosure. The petitioner's advertisements are "deceptive as a matter of law." *Caldor v. Heslin*, 215 Conn. at 595 (Pet. App. 5a).

B. The Regulation Reasonably Advances A Substantial State Interest.

The petitioner argues that the regulation bears no reasonable relation to the governmental interest the regulation was designed to address (Pet. Brief 11). In order to advance this argument, the petitioner mischaracterizes the state's interest to be controlling burdensome rebate redemption conditions imposed by manufacturers upon consumers (Pet. Brief 9). However, the Commissioner's designee testified at trial that the state's goal is to address *deceptive advertising* (T. 2-23-89 p. 30).

Net price advertising is deceptive because it misrepresents that the advertised net price is the true ultimate price the consumer will have paid for a product after obtaining the rebate, and fails to disclose costs and expenses the consumer must pay to obtain a rebate, and limitations on rebate availability. Retailers who use net price advertising offer a product at a price which consumers do not pay for the product. Most purchasing consumers never obtain the rebate; those who do pay more than the advertised net price.

Protecting consumers from misleading or deceptive advertising is a substantial state interest. *Friedman v. Rogers,* 440 U.S. 1, 15, 99 S. Ct. 887, 897 (1979). By requiring those retailers who choose to use net price advertising to make the rebate available at the time of purchase, the regulation ensures that the true ultimate price consumers will have paid after obtaining the rebate is the advertised net price. The regulation directly advances the state's interest in protecting consumers from this type of deceptive advertising.

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has

> no reasonable relation to the unlawful practices found to exist.

Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-13, 66 S. Ct. 758, 760-61 (1946).

Contrary to the plaintiff's assertions (Pet. Brief 10), the regulation does not "prevent retailers from providing consumers with important price information." The regulation does not apply to or restrict advertising of rebate availability, the amount of the rebate available, that a product is on sale, and the price of the product (T. 1-24-89 p. 105); 9 Reg. Conn. Agencies, DCP § 42-110b-19(e). Relevant, truthful information is not affected. Only the deceptive component of the petitioner's advertising, the net price, is regulated. In tailoring the regulation chosen to accomplish the state's purposes, this Court does not require the least restrictive means. The Court "leave[s] it to governmental decisionmakers to judge what manner of regulation may be employed." *Board of Trustees of the State University of New York v. Fox*, ____ U.S. ____, 109 S. Ct. 3028, 3035 (1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

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(3)

No. 90-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CALDOR, INC.,
Petitioner,

v.

COMMISSIONER OF CONSUMER PROTECTION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Connecticut

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

I. THE STATE MISCHARACTERIZES PETITIONER'S RELIANCE ON *PEEL v. ATTORNEY REG. & DISCIPLINARY COM'N* IN AN EFFORT TO OBTAIN A LOWER STANDARD OF REVIEW OF THIS REGULATION

Petitioner Caldor, Inc. ("Caldor"), relies on *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, —— U.S. ——, 110 S.Ct. 2281 (1990), for the proper standard of review to be applied in this case because the lower court review in *Peel*, by the Illinois Supreme Court, focused on acceptance of administrative

findings without challenging their support, as the Connecticut Supreme Court did in this case. In its response, the state claims that "*Peel* did not involve review of an administrative agency's or lower court's findings of deception. . . . It was undisputed that the facts stated in the advertising were true and verifiable." (Resp. Brief at p. 7). This statement is a mischaracterization of how this Court described the *Peel* record below:

> Although the Commission's "Findings of Facts" did not contain any statement as to whether petitioner's representation was deceptive, its "Conclusion of Law" ended with the brief Statement that petitioner,
>
> > by holding himself out, on his letterhead as 'Gary E. Peel, Certified Civil Trial Specialist—By the National Board of Trial Advocacy,' is in direct violation of the above cited Rule [2-105(a)(3)].
> >
> > We hold it is 'misleading' as our Supreme Court has never recognized or approved any certification process. *Id.*, at 20a.
>
> The Illinois Supreme Court adopted the Commission's recommendation for censure. It held that the First Amendment did not protect petitioner's letterhead because the letterhead was misleading in three ways . . .

Peel, supra, —— U.S. at ——, 110 S.Ct. at 2286. Hence, the Illinois State Supreme Court specifically found the letterhead misleading. Thus, as in this case, the central issue in *Peel* involved the misleading nature of advertising and whether or not the regulation of that advertising could be upheld under the First Amendment. As in *Peel*, the procedural posture of this case requires a reviewing court to exercise *de novo* review to determine whether the challenged speech is misleading. *Peel, supra,* —— U.S. —— at ——, 110 S.Ct. at 2291-92.

II. FIRST AMENDMENT PROTECTION DOES NOT DEPEND UPON THE SOURCE OF THE LEGISLATIVE ACTION

The mere fact that this regulation emanated from an administrative agency does not insulate it from First Amendment analysis. The respondent insists that this is not a constitutional challenge (Resp. Brief at 8), because petitioner simply challenged the commissioner's authority and thus, entitles Caldor only to a lower threshold of review, *i.e.*, whether the commissioner abused her discretion, without regard to the constitutional constraints on the commissioner's authority.

First, the respondents evaded First Amendment *de novo* review in the lower courts by the mere reliance on the genesis of this regulation being an administrative agency. Second, respondents' reference to *Harry & Bryant Co. v. FTC*, 726 F.2d 993, *cert. denied*, 469 U.S. 820, 105, S.Ct. 91 (1981), is inapposite as *Bryant* did not hold that a regulatory authority could not be challenged, but simply determined than on evidence before the court the agency action was reasonably necessary to prevent future deception. *Id.*, 726 F.2d at 1002. No case could be more inapposite to the issue at hand. Here, as noted in the dissent of Justice Covello, there was a complete absence of any evidence in the record to support the commissioner's findings. *Caldor v. Heslin*, 215 Conn. 590, 603 (1990) (Pet. App. 13a) (Covello, J., dissenting), and the majority made no attempt to look at the evidence. *Id.*, 215 Conn. at 595 (Pet. App. 6a).

III. RESPONDENTS' CLAIM THAT THIS IS SIMPLY AN OVERBREADTH CHALLENGE SHOULD BE DISREGARDED

Petitioner does not claim the regulation is overbroad, but rather that the regulation is not narrowly tailored to achieve the stated purpose. Because petitioner makes no such argument, respondents' remarks addressed to an

overbreadth argument should be disregarded. (*See* Resp. Brief, p. 12). As respondents concede, no amount of disclosure would make net price advertising immune from this regulation. (Pet. Brief at 4, Pet. App. at 23a-24a). The respondents apparently interpret this as a claim of overbreadth. The misreading by the respondents only serves to emphasize the inherent difficulties with the current application of First Amendment protections in the context of allegedly deceptive advertising. As in *Peel*, the overbreadth doctrine has no relevance to this analysis. *Peel, supra*, —— U.S. at ——, 110 S.Ct. at 2291, n.15.

The brief of the respondent illustrates the confusion existing in the courts as to the application of the commercial free speech doctrine, and specifically what level of record or empirical evidence is required to support the findings of potentially misleading or inherently misleading advertising. In addition, these issues need to be addressed in the context of an administrative agency attempting to control consumer conduct through its regulation, without record evidence of a tendency to deceive.

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